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THE MONTANA CONSUMER COUNSEL
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MONTANA LEGISLATIVE CONSUMER COMMITTEE
FOR THE YEAR 1976

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The Montana Consumer Counsel herewith and hereby respectfully submits his annual report for the year 1976 pursuant to the provisions of R.C.M. 1947, 70-707(7).

CREATION OF OFFICE

Most of what follows under this and some other headings has been set forth in the annual reports to the Legislative Consumer Committee for previous years. It is herein repeated for handy reference of committee members and other interested persons and has been updated in light of the experiences of 1976.

The committee will recall that the office of the Montana Consumer Counsel is a creature of the Montana Constitution of 1972, which mandated the legislature to provide for such an office to represent consumer interests in hearings before the Montana Public Service Commission or any other successor agency.

At the first legislative session following the adoption of the Montana Constitution of 1972, the legislature implemented the constitutional mandate by enacting what has been codified as R.C.M. 1947, 70-701 and following. By that act, the legislature established the office as an agency of the legislatuve branch of government, answerable to a bipartisan committee of legislators serving as the Legislative Consumer Committee. The committee exerts authority over hiring the Consumer Counsel and staff, major expenditures, decisions to litigate, decisions to participate in proceedings conducted by federal regulatory agencies, and decisions to hire outside experts for important cases.

The present Legislative Consumer Committee consists of Representative Joe Quilici, democrat from Butte, Chairman; Senator Ed Smith, republican from Dagmar,

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Vice Chairman; Senator Tom Towe, democrat from Billings; and Representative Dennis Casey, republican from Wolf Point. All members are either businessmen or have business interests. Committee members are appointed each legislative session. They can succeed themselves if it is the pleasure of the appointing body.

The original Consumer Counsel Act was amended in 1974 to lend to the committee more flexibility regarding committee meeting dates and to give the Consumer Counsel more discretion over what administrative matters the office might participate in. (The original statute mandated the Consumer Counsel to attend all proceedings conducted by the Public Service Commission. As amended, the authority is permissive and authorizes the Consumer Counsel to participate in regulatory proceedings before both state and federal regulatory agencies and courts.)

The Montana Consumer Counsel is the only such consumer agency enjoying constitutional status. It is also the only such agency functioning as an agency of the legislative branch of government, as contrasted to being an agency of the executive branch, as universally pertains elsewhere. Surveys disclose that there are an increasing number of agencies having similar functions in sister states, as well as at least four consumer-type agencies functioning in federal government. Alternative forms of agencies have been discussed briefly in previous annual reports. Montana's approach is unique and considered the best conceptually by observers of consumer advocacy activities, because of the autonomy of the office. The office enjoys complete independence from the administrative branch of government and the regulatory agency. It also enjoys a unique aspect of funding in that expenditures in excess of legislative appropriations may be approved by a majority of the Legislative Consumer Committee.

IMPLEMENTATION OF OFFICE

Under the Consumer Counsel Act, discretion reposes in the committee to implement

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the office and staff and approve future expansion thereof, if any. The office has now achieved a degree of maturity after more than three years in operation.

At this point in time, the staff now consists of one full-time Consumer Counsel, who is an attorney licensed to practice law in Montana; one full-time salaried staff attorney, one full-time salaried transportation advisor, and one full-time salaried secretary. Those positions are filled by the same persons who originally took the positions. In addition to the salaried staff, a utility advisor is retained on a monthly basis. The staff is supplemented from time to time, with the approval of the committee, by the hiring of attorneys and expert witnesses.

The Consumer Counsel is Geoffrey L. Brazier, of Helena, Montana, who assumed the position on August 1, 1973. Mr. Brazier has a background in constitutional, administrative and regulatory law and in government administration.

The staff attorney is John C. Doubek, III, of Helena, a recent graduate of the University of Montana Law School. He is developing knowledge and skills in the esoteric fields practiced by the office of Consumer Counsel.

The transportation advisor is Patrick F. Flaherty, formerly of Silver Spring, Maryland, who has an extensive background in motor carrier cost accounting. During his employment, Mr. Flaherty has participated as a witness in both motor carrier and railroad cases before the I.C.C. and the Montana Public Service Commission. As the opportunity has permitted, he has attempted to develop skills and knowledge relating to utilities. In particular, he has attended utility regulatory workshops and participated in several water rate and small utility rate cases. He has also attempted to familiarize himself with the activities of utilities regulated by the Montana Public Service Commission, but has been hampered somewhat in orderly development of that knowledge by a heavy agenda of transportation cases. Mr. Flaherty has also begun a program of computerizing data reported to the Public Service

Commission on an annual basis by regulated motor carriers.

Celia Farlan continues to be the salaried secretary. The Consumer Counsel and the committee enjoy not only her professional secretarial skills but the benefit of her experience from previous employment by the Public Service Commission.

The committee and counsel have been privileged to retain the services of William M. Johnson of Helena, Montana, as utility cost and rate expert. Mr. Johnson was head of the utility and the centralized services divisions of the Montana Public Service Commission for many years, terminating his employment in the spring of 1974 upon advise of his physician. During these transitional times, Mr. Johnson remains the single most knowledgable person in the state of Montana with respect to the history, present activities, structure and records of all regulated utilities, as well as of rulings and orders of the Commission and its predecessor.

The office also continues to enjoy a mutually favorable relationship with the Transportation Division of the State Department of Agriculture, formerly headed by Mr. Gene Carroll, who is now the director of rail planning for the state. Mr. Carroll has been succeeded by Mr. Terry Whiteside. The two offices have collaborated in a number of cases involving intrastate railroad rates and railroad line and facility abandonment cases.

With respect to the hiring of expert witnesses, the regular staff of the office has been able to handle the day-to-day business that comes before the office. However, the committee has seen fit to authorize the hiring of the services of Mr. George F. Hess, Consulting Engineer, of Minneapolis, Minnesota, to participate as an expert witness opposed to recent applications by Montana's two major utilities for authority to increase rates. Mr. Hess has participated for approximately ten years in matters involving Montana's three largest utilities and is familiar with their books and records and background to such an extent that he can efficiently prepare and give

testimony in opposition to the utilities' cases based on generally accepted utility rate-making principles.

With respect to the hiring of counsel, the committee has heretofore authorized the hiring of William E. O'Leary, of Helena, Montana, who was attorney for the Public Service Commission for a period of approximately ten years, to assist the office in resisting major utility rate cases and to participate in a number of railroad matters, most of which are being heard under the jurisdiction of the Interstate Commerce Commission. The committee has also approved the hiring of other attorneys on an hourly basis in certain matters litigated locally.

The office has hired the services of Mr. Thomas M. Auchincloss, Jr. of Washington, D.C. to assist it and the Department of Agriculture in litigating an appeal from an Interstate Commerce Commission decision raising rates for Montana intrastate transportation of commodities by rail. It is felt that the case involves issues of far reaching importance to shippers and carriers nationally and has the potential to go to the U. S. Supreme Court.

The office, with the approval of the committee, has joined as a party of record and contributed data and funds to the defense group resisting Federal Power Commission Opinions No. 770 and 770-A. These FPC decisions have the potential of increasing costs to consumers of natural gas in the nation approximately four million dollars.

With the hiring of Mr. Doubek, there has been, and appear to be, no future occasion to hire law students for the summer.

ACQUISITION OF CAPITAL EQUIPMENT AND OFFICE SPACE

With the hiring of a salaried staff attorney, it became necessary to obtain additional office space and equipment.

The office has moved to remodeled accomodations at 34 West Sixth Avenue in Helena. Twice as much space in more modern condition has been rented for $25.00

more per month.

This seems the place to report that the earlier commitment of the State Department of Administration to find accomodations in the state capitol building is being held in abeyance for the foreseeable future.

EXPENDITURES

Functions of the office are financed by fees charged against the gross intrastate operating revenues of all companies regulated by the Public Service Commission in accordance with the constitutional and statutory provisions. The legislature appropriated $80,000 per year for the functions of the office for the first two years of its existence. Appropriations for the fiscal year ending June 30, 1976 were $125,753 and for the fiscal year ending June 30, 1977 were $128,397 respectively. The levy rate is computed by the Department of Revenue based on appropriations to the office of Consumer Counsel (as may be modified by additional expenditures authorized by the Legislative Consumer Committee) and total gross operating revenues of all regulated companies.

In spite of increased expenditures by the office, the levy rate has declined. This reflects increased revenues of regulated companies.

Because the office, during its third year in existence, was caught up in what is probably the heaviest hearing schedule in the history of the Public Service Commission, including cases demanding the assistance of expert witnesses and attorneys, expenditures for the fiscal year ending June 30, 1976 far exceeded amounts appropriated. The situation was aggravated by the fact that the Montana Public Service Commission, in its first years of operation under a five-commissioner concept, was experimenting with case management while being indoctrinated. One result was that the Commission staff indulged in extensive cross examination and discovery in the major utility cases, prolonging proceedings considerably in excess of the times

previously dedicated to hearings of such nature. That circumstance, combined with the aspect of two major utility hearings back to back and other relatively major contested cases necessitated unusual expenditures for attorneys, expert witnesses, transcripts and travel. Cases involving federal regulatory proceedings (I.C.C., F.P.C. and C.A.B.) and litigation based thereon caused additional expenditures for counsel, travel and communications.

This office does not intend to use the circumstances to justify submitting any significantly increased appropriation request. Hopefully, inflation will subside, the P.S.C.'s case load management will become more sophisticated and uniform reporting and filing requirements and rules of practice and procedure will be adopted by the P.S.C. However, some allowance will have to be made for staff size and cost of living allowances.

It is cautioned, however, that because of inflationary times and the construction of major coal-fired electric generating facilities by the major utilities, they have filed petitions for authority to make additional increases to utility rates in the next calendar year. There is also a strong rumor that Mountain Bell will file for a general rate increase next year. Therefore, the calendar year 1977 could also see some unusual expenditures in defense of major utility rate cases. In this respect, there is a strong possibility that the P.S.C. may end its experiment with the practice of playing the adversary role in major utility rate cases. If that happens, this office will be obliged to sponsor witnesses with expertise relating to the cost of money, which will have a bearing upon the rate of return the utility should earn on its utility property. If this occurs, there will be substantial additional demands on the financial resources of this office.

On the other hand, Public Law 94-385, the Energy Conservation and Production Act appears to grant to state offices of consumer advocates funds for expert witnesses with respect to rate design reform. The Federal Energy Administration has not as yet

adopted regulations implementing the law. This office is monitoring the matter through both the local office of the F.E.A. and its national headquarters. If this office qualifies for such funds in a pending case, it will make an immediate request of the Legislative Consumer Committee for authority to take advantage of the situation.

The Legislative Consumer Committee has been regularly favored with copies of computer printouts supplied by the Department of Administration showing the current financial posture of the office with updated comparisons of anticipated and actual expenditures for the operation of the office. As supplementary material, the Consumer Counsel herewith submits the following summary of expenditures for the office for the months January through November, 1976, inclusive:

Salaries	$ 52,790
Other Compensation	$ 715
Benefits	$ 6,141
Contracted Services	$ 56,614
Supplies	$ 764
Communications & Transportation	$ 2,647
Travel	$ 6,908
Rent	$ 2,800
Other Expenses	$ 2,084
Equipment	$ 629
TOTAL	$ 132,092

Normal monthly expenditures have been $ 12,000 . Unusual expenditures during the month of December are not anticipated.

The committee has sanctioned an expenditure of over $42,000 for the purchase

of electricity meters and $3,000 as a contribution to the defense group contesting F.P.C. Opinions No. 770 and 770-A, but these expenditures have not been made as yet. They will be by the end of the fiscal year.

CONSUMER COMPLAINTS

The title of the office is "Consumer Counsel". It is taken from language in the Constitution. This had lead to the assumption on the part of many people that the functions of this office include attending to problems of the typical retail consumer nature. Quite predictably, the office has had numerous occasions to correct the mistaken assumptions and refer the complaining party to the Consumer Affairs Division of the State Department of Business Regulation or other appropriate consumer protection agencies. At one time a procedure was practiced whereby a count could be kept of the actual number of referrals. However, experience indicated that a great deal of otherwise more useful time was spent in documenting the referrals. So the practice was abandoned. It seems safe to say that referrals during the past two years averaged at least one a day.

The Public Service Commission has created a staff position of Customer Service Representative. Referrals are made to her office on a regular basis. Under House Bill No. 328 of the 1975 Legislature, this office has authority to represent parties whose utility service has been denied or terminated without hearing. We stand ready to serve in the capacity authorized. However, it has been our experience to date that all of the complaints and difficulties with respect to service termination have been resolved through the Commission's office of Customer Service Representative. There has been no occasion to seek district court intervention to prevent utility service termination prior to hearing. There have been several occasions when we felt obliged to remind those involved of our authority to litigate, but all have been

disposed of informally. In fact, some complainants have thanked or complimented our office and the P.S.C. Customer Service Representative.

Other subjects of complaint have included motor carrier claims and freight delivery delays. Because this office has no delegated authority to enforce a law or a P.S.C. regulation, the complaints have been referred to the Motor Carrier Enforcement Bureau of the Public Service Commission or to the Bureau of Motor Carriers of the Interstate Commerce Commission for handling in most cases. Experience in handling complaints related to loss and damage claims lead this office to successfully advocate the enactment of House Bill No. 537 by the 1975 Legislature, amending R.C.M. 1947, 8-812. It now appears that this office was in the forefront of a broader movement. The I.C.C. has revised its regulations on the subject. California has adopted regulations on the subject. There is a bill pending in Congress on the subject. Many provisions are similar to those in House Bill No. 537.

ANTICIPATED CASES AND PROJECTS

For the benefit of potential new committee members, the following brief resume of anticipated cases and projects of the office for the ensuing biennium is presented.

Under the Railroad Revitalization and Reorganization Act of 1976, it is encumbent upon each state to indulge in an extensive project of planning rail facilities in order to qualify for federal rehabilitation and revitalization funds. In this respect, it seems very likely that the state rail planner will schedule a series of public hearings in strategic locations throughout the state in order to obtain input from the public. It may become the function of the Consumer Counsel to organize the public in the sensitive areas and assist it in making meaningful and readable presentations of their particular concerns.

In other rail matters, the Consumer Counsel is on record as opposed to two cases pending before the I.C.C. under Section 13(4) of the Interstate Commerce Act, in

which Montana railroads have sought to bring rates for transportation of commodities in intrastate traffic up to levels of rates for transporting commodities in interstate traffic. The committee has been briefed on the progress of these cases on an ongoing basis since the office's involvement. It is anticipated that at least one of the cases will be filed in an appropriate federal circuit court before the end of the calendar year. The other case may likewise result in litigation at the pleasure of the committee, but likely will involve a different issue of law. The issues raised by the two cases have far reaching importance to railroads and shippers by rail nationally. It is also possible that future attempts by Montana railroads to raise rates for transportation of goods and commodities in intrastate traffic will likewise be contested by the Consumer Counsel.

The Consumer Counsel as reported elsewhere is participating as a contributor of funds, statistical data and moral support to the defense group contesting Federal Power Commission Opinions No. 770 and 770-A, relating to prices that may be charged by producers of natural gas dedicated to interstate commerce. As has been reported elsewhere, the case has the potential of raising the cost to Montana consumers of natural gas in the neighborhood of $4 million annually.

The grapevine has it that Mountain Bell is seriously considering filing an application with the Public Service Commission for authority to increase its rates generally to generate more revenue on its Montana intrastate business. No doubt pay phone rates will be included. It is otherwise impossible at this time to anticipate what the issues might be, but because of the complex nature of telephone utility plant, the numerous affiliates of the utility, and the interstate traffic of the company, the case promises to provide a long and detailed hearing.

As new subjects for possible contested future cases, the committee is reminded of the possibility that the Public Service Commission may be delegated authority to

regulate rates for cable television service and may have its authority over sewer service clarified. The earlier of these possible cases will be cases of first impression and the office of Consumer Counsel will be plowing new ground on these subjects.

The most recent filing by the Montana Power Company incorporates Colstrip #2 generating plant into its rate base, and no doubt will be modified in the light of the final decision on F.P.C. Opinion No. 770 and 770-A, as well as the most current Canadian gas prices. Colstrip #2 will constitute the largest, single, incremental increase in electric utility rate base experienced by Montana Power Company in many years.

In another vein, it is anticipated that the new Public Service Commission or other regulatory agency will indulge in rule-making proceedings relating to the content of annual reports to be filed by regulated motor carriers, relating to rules of practice and procedure in contested cases coming before it, relating to affirmation of a uniform system of accounts for both utilities and motor carriers, and instituting computerized reporting of data in annual reports filed by regulated companies.

PENDING LITIGATION

At this point in time, the Consumer Counsel is or will be involved as a party of record in cases pending before the Federal Circuit Court of Appeals, before the Montana Supreme Court and before state district courts (that is, trial courts) in the State of Montana. Because many of these cases involve interpretations of statutory language, they have potential far-reaching impacts.

The Consumer Counsel is a party of record, along with the defense group headed by the American Public Gas Association, appealing Federal Power Commission Opinion

No. 770 and 770-A and fighting appeals by gas producers in circuit court of appeals, reputed to be sympathetic with those business interests. The case involves billions of dollars to natural gas consumers nationally, and approximately $4 million annually to Montana gas consumers, both by way of a direct cost to Montana-Dakota Utilities Co. and a bootstrap effect upon the market price provisions of contracts that Montana Power Company has with Montana producers. The threshhold issue will be which circuit court of appeals has jurisdiction over the matter. It is in the interests of Montana consumers that the circuit court of appeals in Washington, D.C. retain jurisdiction.

The second issue already decided is that increased rates charged by producers under Opinions No. 770 and 770-A are subject to rebate depending upon the outcome of litigation. Other issues which are complex and voluminous involve the propriety of the Federal Power Commission's proceedings and the quality of statistical data relied upon by the F.P.C.

It is anticipated that the Consumer Counsel, with the assistance of Washington, D.C. counsel, will file an appeal from an I.C.C. decision authorizing an increase on rates charged by Montana railroads for transportation of commodities in intra-state commerce to the I.C.C., Ex Parte 305 level in either the circuit court of appeals in Washington, D.C. or the circuit court of appeals in San Francisco. The present inclination is to file in San Francisco, because of the large volume of I.C.C. appeals pending before the Washington, D.C. court which has the natural effect of causing that court to handle cases in a perfunctory manner, and also because the western court may be more sympathetic with western interests. The issues on appeal are whether the I.C.C. abused its discretion in not giving weight to evidence of protestants and giving weight to very sketchy and hypothetical evidence of the railroads, and whether there is any longer any defense to a Section 13 application

by railroads to the I.C.C.

There are presently pending before the Montana Supreme Court two appeals by regulated carriers. One challenges the authority of the Consumer Counsel to indulge in discovery proceedings in contested cases pending before the Public Service Commission. The other has the potential of challenging the authority of the Consumer Counsel to request a hearing notwithstanding a statute that, standing alone, appears to mandate the Commission to grant a temporary rate increase if it has not otherwise taken action on an application within a 180-day period. Underlying and confusing the issues in both cases is administrative delay by the Commission. The case challenging the Consumer Counsel's discovery powers is a matter of interpretation of statute. As an independent precaution against possible adverse ruling by the Montana Supreme Court, the Consumer Counsel has recommended remedial legislation.

With respect to the case involving a 180-day handling period, the district court, disregarding arguments by the Consumer Counsel that the delay was caused by the carrier itself, decided the case favorably to the Consumer Counsel on the reasoning that, if the Consumer Counsel wants a hearing, he is entitled to one, notwithstanding the 180-day statutory limitation. This case may also generate proposed remedial legislation but, since the appellant has not as yet filed a brief disclosing its contentions, that is a conjectural possibility.

There is pending before a district court a case seeking a declaratory judgment interpreting the temporary rate increase provision of R.C.M. 1947, 70-113. It is the contention of the Consumer Counsel that the statute is unambiguous and contemplates only one temporary rate increase in any one docket pending before the Public Service Commission, and that increase only before hearing. Naturally, the utilities indulging in applications for temporary rate increases are opposing

this case as intervenors. They have injected a procedural side issue whether the Consumer Counsel should join all regulated utilities in Montana, as well as all customers of regulated utilities. Obviously, such issue, if resolved favorably to the utilities, would place an unmanageable burden upon the Consumer Counsel or any other interested parties otherwise inclined to pursue the remedy of declaratory judgment for interpretation of statutes in the Public Utility Act or the Motor Carrier Act.

Another case pending in district court is one challenging the propriety of a Commission order authorizing Burlington Northern to levy a minimum charge on small shipments of the level charged for 6,000 lb. shipments. The implications of such relief appear to the Consumer Counsel to result in the abandonment of transportation service to a number of small communities on the highline. In order to forestall such a dire result until the matter could be clarified, the Consumer Counsel sought judicial relief by way of appeal under the Administrative Procedure Act. It is anticipated that the railroad will intervene and that the parties will stipulate to a court order mandating the preservation of alternate or substitute service to all stations implicated by the proceedings.

There has been pending for several years a case in district court in Billings brought by Burlington Northern from a decision by the Public Service Commission refusing to dualize the agency stations at Brockway and Circle. In view of rail planning under the Federal 4-R Act, and in view of the fact that regulation is a continuing matter and the railroad can always file another application for dualization or similar relief, it is the opinion of the Consumer Counsel that this case has little, if any, far-reaching implications.

The pending decision on Montana Power Company's 1975 application for authority generally to increase its rates on both electric and gas service may raise issues

serious enough to merit litigation. In keeping with established custom and practice of the Consumer Counsel and the committee, those matters will be called to the attention of the committee at the appropriate time for its action.

ADMINISTRATIVE HEARINGS

Prior to July 1, 1974, under statutory mandate, it was incumbent upon the Consumer Counsel to attend all hearings conducted by the Commission. The statutory mandate proved to be self-defeating, because its effect was to burden the Consumer Counsel with attending many hearings involving motor carrier operating authorities where competition usually contested the applications and asked the relevant questions. This mandate necessitated the unnecessary expenditure of time and travel money to observe proceedings which were almost perfunctory in nature. The 1974 Legislature changed the provision, with the result that this office did not attend as many hearings as it did during the first year of its operation. However, there have been many more hearings than the normal law office in Montana handles in several years and many of them have been of several weeks' duration.

During the past year, this office has participated or is participating in six matters before the Interstate Commerce Commission, four involving transportation rates, one involving line abandonments and one involving switching rates. This office has also participated in an airline route case conducted by the Civil Aeronautics Board and a major national gas rate case conducted by the Federal Power Commission. In addition to court matters, which are commented on in detail elsewhere herein, this office has participated in or is participating in 8 proceedings before the Public Service Commission involving proposed facility abandonments or dualizations, 26 cases before the Commission involving motor carrier rate increases, 19 cases before the Commission involving proposed utility rate increases, one proceeding before the Commission involving a proposal by Frenchtown area

telephone users for extended area service, one proceeding before the Commission involving the future extended area telephone service in the state, one proceeding before the Commission brought by Burlington Northern, Inc. to establish a 6,000 lb. minimum charge on shipments on the former Great Northern line, two brought this year by the Montana railroads to increase rates on intrastate transportation of commodities by rail. In addition thereto, this office has participated in six rule-making proceedings conducted by the Public Service Commission.

It is estimated that this office in 1976 participated in the saving of increased rates for transportation of commodities intrastate by both rail and motor carrier of over $2,750,000 annually. It is also estimated that this office participated in the saving by postponement of increased rates for utility services of over $26,500,000 in 1976. Cumulative total savings of the office to date are estimated to be approximately $38,850,304.

Additionally, there are pending before the Commission applications to increase rates for utility service in the cumulative total annual amount of over $74 million. It remains to be seen what the end result of those proceedings will be, but in those cases, the only meaningful substantive opposition to the proposed increase or the only substantive evidence for a lesser increase was presented by the office of Consumer Counsel.

ASSOCIATION ACTIVITIES

During the course of its development, the office and staff have become members or participants in a number of associations or councils concerned with subjects that the office deals with.

For example, the Consumer Counsel has been for some time a member of the Association of Interstate Commerce Commission Practitioners. Membership generates

some important trade literature and journals dealing with current developments in transportation regulation. The Association of Interstate Commerce Commission Practitioners also sponsors annual workshops for the enhancement of the knowledge and skills of members.

The Consumer Counsel has also acceded to the request of the Governor to serve as a member of the Transportation Council of the Federation of Rocky Mountain States to represent Montana interests in that endeavor. The committee will recognize that the Federation of Rocky Mountain States is a non-profit organization dedicated to mutual efforts to advocate regional concerns to federal governmental entities. The press of priority business has made it impossible for the Consumer Counsel to attend activities of the Federation during the year 1976.

The Consumer Counsel was also appointed by the Governor to his Task Force on Coal Gasification. The Task Force is an eight-member group drawn from government and industry for the purposes of evaluating the implications of establishing a coal gasification plant in Montana to provide an alternate source of gas in anticipation of the contingency that present sources of supply are used up in the near future.

The office also is an associate member of the Shippers National Freight Claim Council, Inc. of New York. The SNFCC is a recently-organized trade association of shippers for the mutual purpose of developing meaningful shippers loss and damage protection. The participation of the office has been as a subscriber to periodic literature. That literature has proved useful in keeping the office current on Congressional enactments and I.C.C. regulations for shipper protection, as well as recent precedent-setting court cases.

REMEDIAL LEGISLATION

Under the provisions of Section 7(7) of the Consumer Counsel Act, the Consumer Counsel may recommend remedial legislation to the Legislative Consumer Committee. The obvious result of such procedure will be that, if recommendations are viewed favorably, bills will be drafted, introduced and carried by committee members. There has been insufficient past experience to develop a custom, practice or policy as to how the committee should proceed with the matter of remedial legislation. It therefore is open to this committee to review the recommendations of the Consumer Counsel, revise them, and decide whether any of the proposed bills merit being enacted into law. If the decision is favorable, an acceptable bill may be drafted by either the Consumer Counsel or the Legislative Council and introduced and carried by one or more committee members. Aside from that, there is no prohibition in the Consumer Counsel Act or elsewhere against an individual committee member suggesting bills himself or proceeding on his own to support or oppose recommended bills or bills of a similar nature treating the same subject.

This being a year approaching a legislative session and the Consumer Counsel having two year's experience in regulation of utilities and transportation in Montana to draw upon in identifying problem areas meriting remedial legislation, the Consumer Counsel with this annual report has indeed recommended some bills to the committee.

Most of the bills recommended by the Consumer Counsel can be traced to recent difficulties with regulatory lag exemplified by the delay of the Public Service Commission in issuing final orders primarily in major utility cases. Since a number of smaller utilities in the state rely upon Montana Power Company

for their natural gas supplies, delayed decisions regarding rates to be charged by Montana Power for natural gas have a wave impact upon other utilities. For example, assume a two-year delay in arriving at a decision during a time of some of the most accelerated inflation in history. Some utilities feel that the circumstances necessitate unusual procedures to retain revenue margins. Under current Montana statutes (R.C.M. 1947, 70-113) utilities may file with the Public Service Commission applications for temporary approval of increases pending hearing and final decision. They may also file new applications for rate increases while decision is pending upon earlier applications. The utilities, particularly Montana Power Company, Montana-Dakota Utilities Co. and Great Falls Gas Company have resorted to these remedies in a variety of combinations and have also made applications for more than one increase in pending dockets both before and after hearing, but in all cases prior to final decision. They have done this not withstanding the express language of the statute which contemplates "an increase pending a hearing and final decision". Among the results of indulgence in such practice have been that $26 million have been granted for temporary rate applications since the enactment of the statute. Also, since this office was created and until the filing of this report, Montana Power Company has been authorized by one tribunal or another to raise its rates on natural gas and electricity a total of $45 million annually, without ever having had a decision on a full-scale hearing.

The Consumer Counsel is of the opinion that these results merit remedial legislation. Since it is never certain whether bills will be treated favorably by the entire legislative delegation, the Consumer Counsel has attacked the problem of temporary rate increases on another front through the judicial branch

of government, by seeking a declaratory judgment whether the temporary rate increase statute contemplates one or more temporary rate increases in any pending docket and whether it restricts the rate increase authorization to proceedings prior to formal full-scale hearing.

However, in fairness, it must be recognized that the root of the problem likely is administrative lag. In these respects, the Consumer Counsel has independently petitioned the Public Service Commission on two separate occasions to adopt procedural rules and regulations which hopefully, if practiced, would result in more expeditious case management and speedier decision-making. It has been the experience of the Consumer Counsel that regulatory lag results in bad law, and that result is not beneficial to either the consuming public or the regulated companies. Since the Commission has failed to act with respect to proposed rules of practice and procedure, although at least five formats have been suggested to it, the Consumer Counsel is of the opinion that a legislative mandate to adopt rules of practice and procedure is necessary in order to move the Commission's discretion on a matter of subtle but far-reaching importance. For that reason, he has suggested that the committee introduce and carry a bill patterned after a Michigan statute mandating the Commission to adopt rules of practice and procedure in utility cases. Obviously, problems of regulatory lag also pertain to transportation cases, so a companion bill of similar import and substance is also recommended.

With respect to the problems of temporary rate increases and "pancaking" of cases, the Consumer Counsel has drawn from Senate Bill 94-26 pending in Congress entitled, "Model State Public Utility Commission Act" and from Senate Bill 3311 pending before Congress entitled, "The Electric Utility Coordination Act" for

proposed bills prohibiting a utility from filing for authority to increase rates while a previous application is pending before the Public Service Commission and making it clear that only one temporary increase in any pending case may be granted in any 12-month period.

On the subject of temporary rate increases, committee member Sen. Towe, recalling a recent Montana Supreme Court decision, suggested legislation making it clear that the Commission's discretion with respect to the merits of an application for a temporary rate increase shall be absolute and not reviewable by any court of law.

The committee will recall that the earliest major case of the Consumer Counsel dealt with applications by Montana Power Company to pass-through increased costs of Canadian gas. This case somehow evolved into a Supreme Court opinion sanctioning automatic adjustment clauses purporting to automatically adjust utility rates to reflect changes in utility costs. One of the issues of that case was the propriety of the Commission conducting a mini-hearing examining a limited number of cost accounts of the utility in spite of the fact that opponents moved for a full-scale hearing examining all of the revenue and expense accounts of the utility in order to offset productivity gains against increased cost. Unfortunately, the Supreme Court decision upon review of that issue appeared to sanction "mini" hearings. The committee will recall that House Bill No. 383 which was the legislature's response to automatic adjustment clauses, failed to speak directly to the subject of mini hearings in clear and unambiguous language. Since that court decision, the Commission, contrary to the campaign promises of some of the individual Commissioners, has entertained an application by Montana-Dakota Utilities for a mini-hearing examining a limited number of accounts of that utility with respect to the increased costs of gas as a result of Federal Power Commission Opinion No. 770, over the objection and motion of the Consumer Counsel seeking

an expanded hearing or consolidation with a general rate increase case. Since the circumstance leaves the question unclarified, the Consumer Counsel suggests a bill making it clear that, if opponents seek to expand the scope of a proposed "mini" hearing to contemplate all jurisdictional revenues, expenses and property, the Commission must expand the scope of the hearing.

In the current round of utility rate cases, the Consumer Counsel has also experienced a frustration with respect to the role of the Commission and particularly Commission staff members in utility rate matters. At times during major utility cases, it seemed as though the Commission staff, or members thereof, and the Consumer Counsel's staff, were working at cross purposes because errors of reversible nature challenged by the Consumer Counsel were often cured or diluted when th Commission and staff indulged in cross examination and objections and motions. Also reversible error may have been injected in some proceedings because the decision-maker had displayed prejudicial conduct by indulging in extensive adversary objections, motions and impeachment cross examination. A number of implications result, including the problems caused by duplication of services by public agencies; the reversible nature of a prejudicial posture on the part of the decision-maker or the staff; duplicate expenditure of public funds for the same or contradicting purposes; unduly prolonged hearings escalating costs and fees for transcripts, counsel and expert witnesses; and an issue whether staff members have authority to an appeal or otherwise challenge decisions of the Commission.

Recognizing this inherent dilemma which did not exist prior to the time the public advocate office of Consumer Counsel was created and the adversary role was assigned to it, Sen. Towe suggested a bill clarifying the role of the Commission and its staff in cases in which the Consumer Counsel participates opposing a regulated company.

Experience in the past two years has underscored the perception of the Consumer Counsel in indulging in discovery or data disclosure proceedings prior to hearing in esoteric, complicated rate cases. The authority of the Consumer Counsel to indulge in such discovery-type proceedings in administrative contested cases has been challenged by Burlington Northern, Inc. and is pending decision by the Montana Supreme Court. Because it is absolutely necessary for the Consumer Counsel and other interested parties to rely upon a reasonable application of such procedures in preparation for major hearings, the ConsumerCounsel was moved to recommend a bill which would clarify the discovery powers of the Consumer Counsel. It is the philosophy of the Consumer Counsel that all interested parties have the right to indulge in discovery procedures and that right may be articulated by the adoption of reasonable rules of practice and procedure by the Commission and other administrative agencies speaking to the subject. However, the Consumer Counsel also feels that it should limit its proposed remedial legislation to fields which involve it directly and not expand upon such matters to encompass unrelated and uninvolved parties. So he is at this time officially advocating amendment of the Consumer Counsel Act and statutes relating to Commission practice and procedure, but not to broader, general acts such as the Administrative Procedure Act.

Committee member Sen. Smith recommended an additional item of remedial legislation speaking to the problem caused by the practice of flaring gas which escapes from newly-drilled oil wells. The bill proposed for remedial legislation is drawn from a Kansas statute.

Other possible subjects which have come to the attention of the Consumer Counsel, but which he does not recommend as worthy of remedial legislation at this time, include a bill mandating small claims courts so that shippers with small loss and damage claims would have easier access to judicial relief; a bill that would

permit persons with claims up to $500 to represent themselves in court without an attorney; a bill giving the Commission discretion to order major natural gas utilities to become common carriers of gas; a bill to clarify the Administrative Procedure Act with respect to post-decision remedies of reconsideration and rehearing; a bill to provide for a filing fee in utility cases sufficient to cover the costs to the Public Service Commission of a hearing examiner; a bill to protect consumers from termination of utility service under certain reasonable specified circumstances.

Other bills relating to the general subject matter of utility regulation have come to the attention of the Consumer Counsel from other sources. They include a bill to remove from the Public Service Commission jurisdiction over either water or sewer rates; a bill making clear that the Public Service Commission has jurisdiction over those services; a bill granting to the Public Service Commission authority to regulate cable television rates; a bill dedicating part of Montana's severance tax on coal to subsidize electric and gas bills of poor and elderly customers; a bill permitting customers to have their utility bills include a check-off for contributions to fund a separate consumer advocate agency whose governing board would consist of elective officers (the RUCAG bill); and various bills restructuring the Public Service Commission or removing its authority over transportation matters.

Respectfully submitted,

Geoffrey L. Brazier

Geoffrey L. Brazier,
Montana Consumer Counsel

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